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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1968

No. 1234

KWAI CHIU YUEN, GIM WOON HUEY, also known as Pok Huey, also known as Robert Huey, also known as Fook Yen Lock, and HEUNG LEE, also known as Sam Heung Lee,

Petitioners,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit which sustained orders of the Board of Immigration Appeals holding petitioners ineligible for adjustment of status.

OPINIONS BELOW

The Opinions of the Court of Appeals have not as yet been officially reported, but are set forth at pages i, viii, ix of Appendix A hereto. The relevant opinions of the Board of Immigration Appeals are set forth at pages xiii, xviii, xxi of Appendix C hereto.

JURISDICTION

The judgments of the Court of Appeals were entered on January 16, January 14 and January 14, 1969, respectively (Appendix B, pp. x, xi, xii). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioners each sought adjudication of an application seeking adjustment of status to that of a lawful permanent resident alien under Section 249 of the Immigration and Nationality Act, as amended. The Board of Immigration Appeals found each petitioner ineligible for such relief under Section 212(a)(23) of the Act, excludable because of a narcotics conviction, and that the pardon for such conviction was of no avail to each petitioner because of the specific provision of Section 241(b) of the Act. The Court of Appeals for the Ninth Circuit affirmed holding that Congress had the authority to designate the classes of aliens subject to deportation and that a gubernatorial pardon does not exempt such person from deportation

as an alien convicted of the specified offense. The questions presented are:

1. Whether the restrictive provisions of Section 241(b) of the Immigration and Nationality Act, as amended, holding a narcotic conviction pardon a nullity, is in derogation of the constitutional power of executive clemency.

2. Whether there is a conviction within the contemplation of Section 241 of the Immigration and Nationality Act when a full and unconditional gubernatorial pardon of a State Court conviction of a State penal offense is of record.

3. Whether a full and unconditional pardon shall be granted full faith and credit in an administrative deportation proceeding.

STATUTES INVOLVED

The pertinent portions of the Immigration and Nationality Act, as amended—Section 249 (8 USCA 1259), Section 212 (8 USCA 1182), and Section 241 (8 USCA 1251) are set forth in Appendix D at pp. xxvi, xxvii, xxviii to xxix.

STATEMENT

These suits were originally filed in the Court of Appeals for the Ninth Circuit seeking review of the last order of the Board of Immigration Appeals, as provided by Public Law 87-301, effective October 26,

1961, 75 Stat. 651, 8 USCA 1105(a)(3). The basic facts, which are not in dispute, are as follows:

Kwai Chiu Yuen

Petitioner, Kwai Chiu Yuen, is a native and citizen of China, 61 years of age, who was first lawfully admitted to the United States, through the port of San Francisco, California, on March 3, 1922 as the son of a merchant. On February 24, 1938, petitioner was convicted in the Superior Court of the State of California in and for the City and County of San Francisco, for violation of the narcotics law of the State of California. He was granted a full and unconditional pardon by the Governor of the State of California for said offense on December 20, 1965.[1]

Gim Woon Huey

Petitioner, Gim Woon Huey, also known as Pok Huey, also known as Robert Huey, also known as Fook Yen Lock, is a native and citizen of China, 40 years of age, whose sole admission to the United States was on October 9, 1940 under a false claim to United States citizenship. Petitioner was convicted on January 6, 1949 in the Superior Court of the State of California in and for the City and County of San Francisco for violation of the narcotics law of the State of California. Petitioner was granted a full and

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[1]R. 21-22, Administrative Record Kwai Chiu Yuen.

Article VII, §1, Constitution of the State of California—effective at the time of granting each pardon. Repealed on November 8, 1966 and the substantial provisions thereof transferred to Article V, §8.

In general terms, the President of the United States is granted similar power by Article II, §2, Cl. 1, of the Constitution of the United States.

unconditional pardon for said offense by the Governor of the State of California on June 29, 1963.[2]

Heung Lee

Petitioner, Heung Lee, also known as Sam Heung Lee, is a native and citizen of China, 55 years of age, whose sole admission to the United States was through the Port of San Francisco, California on June 23, 1939 under a false claim to United States citizenship. Petitioner was convicted in the Superior Court of the State of California in and for the County of San Joaquin on July 3, 1955 for violation of the narcotics law of the State of California. Petitioner was granted a full and unconditional pardon for such offense by the Governor of the State of California on December 23, 1963.[3]

In each case the petitioner filed a motion with the Board of Immigration Appeals seeking reopening of his deportation proceeding specifically for the purpose of seeking adjustment of status to that of a lawful permanent resident alien, as provided under Section 249 of the Immigration and Nationality Act, as amended (Appendix D, p. xxvi). In each case the Board of Immigration Appeals denied the motion on the ground that said petitioner was ineligible under Section 241(b) and Section 212(a)(23) of the Immigration and Nationality Act. In reaching said conclusion the Board held that regardless of the pardon, which sets aside the conviction, such alien nevertheless

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[2]R. 87-88, Administrative Record, Gim Woon Huey. Ftn. 1, supra.

[3]R. 24, Administrative Record, Heung Lee. Ftn. 1, supra.

was an alien subject to deportation under Section 241(a)(11) of the Act (Appendix D, p. xxix), as an alien convicted of a narcotic violation, by reason of the limitation specified in Section 241(b) of the Act (Appendix D, pp. xxix-xxx).

Section 212(a), which deals with excludable classes of aliens, and Section 241, which pertains to those subject to expulsion and deportation, both contain a clause relating to aliens convicted of narcotics law violation. The Board and the Court of Appeals each held that even though Section 249, the section under which adjustment of status was sought, refers to the grounds of excludability under Section 212(a) of the Act, the provisions of Section 241 were likewise applicable.[4] Subsection (b) of Section 241, while specifically providing that a full and unconditional pardon or a judicial recommendation against deportation relieves a convicted alien under Section 241 from deportation, the last sentence thereof states: "The pro-

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[4]The Court of Appeals stated, Appendix A, p. iv, ftn. 1:

Concerning the interrelation between the two sections, we agree with the Board, which held as follows in the case now before us:

"A grant of permanent residence under Section 249 would not make the respondent immune from deportation because his pardon does not waive a narcotic conviction. Since the respondent would be subject to immediate deportation under Section 241(a)(11) of the Act once he was admitted and since there is a provision of Section 241(a) which renders an alien deportable if he was excludable by law at the time of entry, we find no logical reason to support a conclusion that the pardoning provisions of Section 241(b) apply to a narcotic ground of excludability without the limitation which denies the waiver to an alien 'who is charged with being deportable' as a narcotic violator."

vision of this subsection shall not apply in the case of any alien who is chargeable with being deportable from the United States under subsection (a)(11) of this section.[5] The Board held that this provision barred each petitioner from adjustment of status. On appeal, the Court of Appeals affirmed.

The Court decision in essence substantiates all of the conclusions of the Board, and then continues by holding that the last sentence of Section 241(b) is not an unconstitutional abridgment of the power of executive clemency.[6] In reaching such determination the Court concluded that the right to exclude or expel aliens rested in Congress; that a gubernatorial pardon does not have the same effect as the exercise of federal executive clemency; and that recognition of the gubernatorial pardon would in effect grant State control in the area of regulation of immigration.

REASONS FOR GRANTING CERTIORARI

This writ of certiorari is sought because the decisions below, refusing to give credence to a full and unconditional gubernatorial pardon, raise a substantial question, novel, unsettled, and of major importance in the administration of the laws of the United States. In upholding the validity of the restrictive

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[5]Added by Section 301(c) of the Act of July 18, 1956 (70 Stat. 575).

[6]The Board held that it was not within its province to consider this issue. Appendix C, pp. xvii and xxv.

provisions of Section 241(b) of the Immigration and Nationality Act, as amended, the decisions below sanction federal legislative encroachment on the power of State executive clemency. In principle, the decisions below nullify the historic concept of a pardon.

1. The Court below resolved the constitutional question arising out of the separation of powers doctrine by holding that "It is clearly a concept which operates as a constitutional limitation as between the branches of the federal government" and that "this concept, however, has no application in the area of Federal-State relations"; but it is urged that this fundamental question can not be so easily avoided.

The State of California and the Federal Constitutions divide the government into three separate, distinct departments—the legislative, executive and judicial. In discussing such separation of powers, this Court in *Springer v. Government of the Philippine Islands,* 277 U.S. 189 at page 201 stated: "And this separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital—not merely a matter of governmental mechanism". The matter of granting a pardon is within the province of the State or of the United States—dependent upon the sovereign against whom the offense was committed. In either instance the operation and effect are the same. In *Solesbee v. Balcom,* 338 U.S. 9, at page 12, it was held that the "Power of executive clemency in this country undoubtedly derived from the practice as it has existed in England." and that "Such power traditionally

rested in governors or the President,". Each petitioner herein was granted a full and unconditional gubernatorial pardon for an offense in violation of State statute. Dispensation of that State plenary power was not in derogation of any federal prerogative.[7] Giving legal significance to both Constitutions, it can not be reasonably contended that exercise of gubernatorial clemency was an intrusion on the federal legislative power to control immigration. A pardon has the force of public law and all Courts and officers, including administrative officials, must take notice thereof *(Jenkins v. Collard,* 145 U.S. 546, 560). Thus, the decisions below are in conflict with the full faith and credit statute, 28 U.S.C.A. Sec. 1739, third paragraph, and the decision of this Court in *Jenkins v. Collard,* supra.

2. Further and substantial issue is also raised by the decisions below, refusing to recognize the general principles of the role of pardons *rooted* in our scheme of justice. It is axiomatic that a pardon is an act of grace and mercy which this Court has stated obliterates further consequences flowing from the pardoned conviction. In *Ex Parte Garland,* 4 Wall. 333, 380, this Court held "When a pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as inno-

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[7]The Fourteenth Amendment of the Federal Constitution leaves the States free to distribute the powers of government as they will between the various branches thereof. *(International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 309 v. Hanke,* 339 U.S. 470, 479, rehearing denied 339 U.S. 991.) California Constitution, supra, ftn. 1.

cent as if he had never committed the offense".[8] (Cf. *Knote v. United States,* 95 U.S. 149, 153; *Ex Parte Wells,* 18 How. 307, 311). Contrary to that principle, the 1956 amendment to Section 241(b) of the Immigration and Nationality Act, the last sentence thereof, rejects the traditional effect of a pardon and, in fact, negates the pardon "in the case of any alien who is charged with being deportable from the United States under subsection (a)(11) of that section". In *United States v. Klein,* 13 Wall. 128, 148, Chief Justice Chase said: "* * * the legislature can not change the effect of such a pardon any more than the Executive can change the law".

The rigorous interpretation of Section 241(b) by the Board and the Court below does not seem consonant with the structural principles of our form of government. Even though this Court was specifically referring to a Presidential pardon when it stated "Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him can not be fettered by any legislative restrictions", the same intendment flows to a properly granted full and unconditional gubernatorial pardon (*Ex Parte Garland,* supra, page 380). Notwithstanding, the decisions of the Board and the Court below are contrary to the

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[8]Except for the decision of this Court in *Carlesi v. New York,* 223 U.S. 51, which held that the Court may consider pardoned past offenses committed by the accused as a circumstance of aggravation in passing sentence, the principle of this case has not been otherwise diminished.

spirit and intent of a pardon in holding such pardons inoperative; and serve to abrogate in whole or at least in part the privilege and prerogative of executive pardoning power. Acceptance of this extraordinary invasion of the power of the executive raises a substantial Constitutional question which is of immediate and far-reaching importance in the administration of the immigration and nationality laws of the United States.

3. The Board and the Court below, relying upon the provisions of Section 241(b) of the Immigration and Nationality Act, as amended, failed to consider the issue as to whether the "conviction has attained such finality as to support an order of deportation within the contemplation of §241 of the Immigration and Nationality Act" *(Pino v. Landon,* 349 U.S. 901). The decisions below attach to the pardoned criminal act a disability which the sovereign against whom it was committed has fully and entirely forgiven and "blotted out". It appears illogical to give less import to a full and unconditional pardon than this Court did in *Pino v. Landon,* supra, where the final order pertaining to that State Court conviction read "Sentence revoked. On file". In *Barber v. Gonzales,* 347 U.S. 637, 642-643, it was held:

> "Although not penal in character, deportation statutes as a practical matter may inflict 'the equivalent of banishment or exile,' Fong Haw Tan v. Phelan, 333 U.S. 6, 10, 92 L.Ed. 433, 436, 68 S. Ct. 374, and should be strictly construed. . . . In the absence of explicit language showing a contrary congressional intent, we must give

technical words in deportation statutes their usual technical meaning."

Recognizing those principles, and the concept of a pardon, it must be concluded that a pardoned conviction is not a "conviction" within the contemplation of Section 241 of the Immigration and Nationality Act.

4. The questions presented by this case are of great and recurring significance, not only in the administration of the Immigration and Nationality Act but elsewhere. The issue raised, refuting the connotation of a pardon, as recognized by common law and by this Court for more than one hundred years commencing with *United States v. Wilson,* 7 Pet. 150, 160, presents a serious question of immediate consequence due to the 1956 amendment to the Immigration and Nationality Act.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for writ of certiorari should be granted.

Dated, San Francisco, California,
April 2, 1969.

JOSEPH S. HERTOGS,
Attorney for Petitioners.

(Appendices A, B, C and D Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 22,282

Kwai Chiu Yuen,
Petitioner,
vs.
Immigration and Naturalization Service,
Respondent.

[January 16, 1969]

On Petition for Review of an Order of the Immigration and Naturalization Service

Before: HAMLEY, JERTBERG and CARTER, Circuit Judges

HAMLEY, Circuit Judge:

Petitioner appeals from a final order entered by the Board of Immigration Appeals (Board) denying a motion to reopen his deportation case. In this motion he urged that he should be allowed to seek relief under section 249 of the Immigration and Nationality Act (Act), 8 U.S.C. § 1259 (1964), which, under certain circumstances, permits a record to be made of lawful admission for permanent residence.

Petitioner, a Chinese alien, entered the United States in 1922. He was convicted in 1938 for violating California narcotics laws and served a term in state prison. The Governor of California, in 1965, granted a full and unconditional pardon for this offense, based on evidence of petitioner's rehabilitation.

In the meantime, in 1963, an order to show cause was issued by the Immigration and Naturalization Service charging that petitioner was deportable because of his narcotics conviction. Following a hearing on this order, a special inquiry officer found that he was deportable but eligible for suspension of deportation under section 244(a)(2) of the Act, 8 U.S.C. § 1254(a)(2) (1964). This statutory provision requires action by Congress. See section 244(c)(3). However, Congress did not act favorably on his proposed suspension and, upon the reopening of the deportation proceedings in 1965, he was therefore ordered deported.

Following entry of the order of deportation, and relying upon the 1965 pardon by the Governor, petitioner moved to reopen his deportation case to apply for section 249 relief. The special inquiry officer denied this motion, holding petitioner was ineligible for this relief on the ground that he was, pursuant to section 212(a)(23) of the Act, 8 U.S.C. § 1182(a)(23) (1964), excludable because of his narcotics conviction. The officer held that the pardon was of no avail to petitioner because of the specific provisions of section 241(b) of the Act, 8 U.S.C. § 1251(b) (1964). The

Board dismissed the appeal, holding that, in view of the statutory provisions, no purpose would be served by reopening petitioner's case.

The decision of the Board, as well as that of the special inquiry officer, was grounded upon application of the following statutory scheme: Section 249 of the Act, under which petitioner seeks relief, provides that a record of lawful admission for permanent residence may be made, at the discretion of the Attorney General, in the case of an alien who entered the United States prior to June 30, 1948, and who, among other requirements, can "satisfy the Attorney General that he is not inadmissible under section 1182(a) of this title [section 212(a) of the Act] insofar as it relates to . . . violators of the narcotics laws . . . ."

Section 212(a) of the Act sets out excludable classes of aliens and provides, in subsection (a)(23), that an alien is excludable from admission into the United States if he has been convicted of a violation of any narcotics law. Although section 212 does not contain any specific provision about the effect of a pardon on such conviction, such a provision is found in section 241(b) of the Act, which deals with the effect of a pardon for deportation purposes.

Section 241 provides that an alien shall be deported upon the order of the Attorney General, if he is convicted of a crime involving moral turpitude (section 241(a)(4)) or a narcotics law violation (section 241 (a)(11)). Subsection (b) of section 241 provides that section 241(a)(4) shall not apply if a full and unconditional pardon for the crime has been granted by

the President or a Governor, or if a judicial recommendation against deportation has been entered. However, the last sentence of section 241(b) provides: "The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a)(11) of this section." It is with the application of this last quoted portion that we are here concerned.[1]

Petitioner contends that the last sentence of section 241(b), which, in deportation proceedings, nullifies the effect of a pardon in narcotics conviction cases, is an unconstitutional abridgement of the power of executive clemency.

The doctrine of separation of powers is not clearly stated in the Constitution, but has been deemed to flow naturally from the division of the federal government into three branches, each given enumerated powers. It is clearly a concept which operates as a constitutional limitation as between the branches of the federal government. See *Kilbourn v. Thompson,*

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[1]Concerning the interrelation between the two sections, we agree with the Board, which held as follows in the case now before us:

"A grant of permanent residence under Section 249 would not make the respondent immune from deportation because his pardon does not waive a narcotic conviction. Since the respondent would be subject to immediate deportation under Section 241(a)(11) of the Act once he was admitted and since there is a provision of Section 241(a) which renders an alien deportable if he was excludable by law at the time of entry, we find no logical reason to support a conclusion that the pardoning provisions of Section 241(b) apply to a narcotic ground of excludability without the limitation which denies the waiver to an alien 'who is charged with being deportable' as a narcotic violator."

103 U.S. 168, 190; *Springer v. Philippine Islands,* 277 U.S. 189, 201.

This concept, however, has no application in the area of federal-state relations. We are here concerned with federal legislative action (the statute in question), vis-à-vis state executive action (a gubernatorial pardon). Whatever the result would be if the clash were between the federal statute and a presidential pardon, we conclude that there is no room for the application of the doctrine of separation of powers under the circumstances of this case.

Apart from the doctrine of separation of powers there appears to be no legal basis for giving overriding effect in this case to the gubernatorial pardon granted petitioner. State attempts at control in the area of regulation of immigration have always been denied effect. It has been deemed that this area is one in which the federal government has exclusive dominion. See the discussion in Gordon and Rosenfield, *Immigration Law and Procedure,* § 1.5, pages 1-27. See also *Fong Yue Ting v. United States,* 149 U.S. 698. This decision explicitly holds that the right to exclude or to expel aliens, or any class of aliens, is vested in the national government and Congress. See also *Harisiades v. Shaughnessy,* 342 U.S. 580, 589, which reaffirms this doctrine in specific terms.

It may be that some erosion of the theory of absolute Congressional power in the exclusion of aliens is taking place, particularly in the area of procedural due process rights. See the discussion in Gordon and Rosenfield, *Immigration Law and Procedure,* at § 4.3,

pages 4-10. However, there is as yet no limitation on the power of Congress to designate certain classes of aliens as undesirable and to select criteria upon the basis of which aliens become subject to deportation. Thus, in *Galvan v. Press,* 347 U.S. 522, which upheld a section of the Internal Security Act of 1950 providing for deportation of any alien who has been a member of the Communist Party after entry, the Court stated at page 531:

> "But that the formulation of these policies [policies pertaining to the entry of aliens and their right to remain in this country] is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government."[2]

Petitioner further contends that this federal statutory scheme nullifiies the effect of a full and unconditional pardon. He alleges that the Board has attached a disability to him on the basis of the conviction even though the conviction should be considered as "wiped out" by the act of the Governor in pardoning petitioner for the offense.

We do not regard this as a sufficient ground for invalidating the federal statute which commands such a result. It is true that, in *Ex Parte Garland,* 71 U.S. 333, upon which petitioner heavily relies for his authority on the effect of a pardon, there is broad

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[2]With specific reference to deportation of aliens because of narcotic violation, see *Maximilliano de la Cruz-Martinez v. Immigration and Naturalization Service,* 9 Cir., ... F.2d ....., decided December 3, 1968.

language to the effect that Congress cannot fix punishment beyond the reach of executive clemency, or consequences which attach to a conviction beyond the reach of executive clemency. But the Court was there speaking of federal executive clemency, not state.

Moreover, *Garland* and like cases deal with the effect of a pardon in releasing an offender from punishment. Accepting as true the premise that a pardon, full and unconditional, federal or state, exempts the convicted person from punishment, it does not thereby exempt such person from deportation. As the Supreme Court stated in *Mahler v. Eby,* 264 U.S. 32, 39: "It is well settled that deportation, while it may be burdensome and severe for the alien, is not punishment." See also *Bugajewitz v. Adams,* 228 U.S. 585, 591; *Chabolla-Delgado v. Immigration and Naturalization Service,* 9 Cir., 384 F.2d 360; *Burr v. Immigration and Naturalization Service,* 9 Cir., 350 F.2d 87, 91.

Affirmed.

United States Court of Appeals
for the Ninth Circuit

No. 22,283

Gim Woon Huey, aka Poy Huey, aka Robert Huey, aka Fook Yen Lock,
Petitioner,

vs.

Immigration and Naturalization Service,
Respondent.

[January 14, 1969]

On Petition for Review of an Order of the Immigration and Naturalization Service

Before: HAMLEY, JERTBERG and CARTER, Circuit Judges

PER CURIAM:

The final order of the Board of Immigration Appeals of the United States Department of Justice, on review in this cause, is affirmed on the authority of *Kwai Chiu Yuen v. Immigration and Naturalization Service,* 9 Cir., ... F.2d ....., decided today.

United States Court of Appeals
for the Ninth Circuit

No. 22,284

Heung Lee, aka Sam Heung Lee,
Petitioner,

vs.

Immigration and Naturalization Service,
Respondent.

[January 14, 1969]

On Petition for Review of an Order of the
Immigration and Naturalization Service

Before: HAMLEY, JERTBERG and CARTER,
Circuit Judges

PER CURIAM:

The final order of the Board of Immigration Appeals of the United States Department of Justice, on review in this cause, is affirmed on the authority of *Kwai Chiu Yuen v. Immigration and Naturalization Service*, 9 Cir., ... F.2d ....., decided today.

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 22,282

Kwai Chiu Yuen,
Petitioner,

vs.

Immigration and Naturalization Service,
Respondent.

Upon Petition to Review an order of the Immigration and Naturalization Service

JUDGMENT

This Cause came on to be heard on the Transcript of the Record from the Immigration and Naturalization Service

and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the order of the said Immigration and Naturalization Service in this Cause be, and hereby is affirmed.

United States Court of Appeals
for the Ninth Circuit

No. 22,283

Gim Woon Huey, aka Poy Huey, aka Robert Huey, aka Fook Yen Lock,
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Appendix C

United States Department of Justice
Board of Immigration Appeals

Aug 3 1967

File: A-4095143—San Francisco

In re: Yuen Kwai Chiu

In Deportation Proceedings

Appeal

On Behalf of Respondent:
Joseph P. Fallon, Jr., Esq.
Fallon, Hargreaves & Bixby
559 Washington Street
San Francisco, Calif. 94111
(Brief filed)

Charges:

Order: Section 241(a)(11), I&N Act (8 USC 1251 (a)(11))—Narcotic law, conviction: California Narcotic Act, selling morphine

Lodged: None

Application: Reopening of the proceeding to afford the respondent an opportunity to apply for relief under Section 249 of the Immigration and Nationality Act

The respondent, a native of the mainland of China and a citizen of the Republic of China on Formosa, has been found deportable as one convicted of a nar-

cotic violation pursuant to Section 241(a)(11) of the Immigration and Nationality Act (8 USC 1251(a)(11)). An order providing for the respondent's deportation to Hong Kong and in the alternative to the Republic of China on Formosa was entered by the special inquiry officer on April 20, 1965. There was no appeal from this decision.

The respondent now moves for a reopening of the proceedings to afford him an opportunity to apply for the creation of a record of lawful admission for permanent residence under Section 249 of the Immigration and Nationality Act (8 USC 1259). The special inquiry officer, in an order dated June 14, 1967, denied the motion. The respondent appeals from this order.

The respondent is a married male alien, 61 years of age, who last entered the United States through the port of San Francisco, California on August 19, 1948. He entered as a returning resident alien on this occasion. The respondent originally entered the United States through the same port on March 3, 1922 as a merchant's son.

The respondent was convicted in the Superior Court of the State of California, San Francisco County, on February 24, 1938 for wilfully, unlawfully and feloniously selling a preparation of morphine in violation of the Narcotic Laws of the State of California. He was sentenced to the State Prison for six years and was paroled on October 28, 1941. He was discharged from parole on April 28, 1942.

The respondent was granted a full and unconditional pardon by the Governor of the State of Cali-

fornia for the narcotic offense on December 20, 1965. His motion for relief is based upon a claim that the pardon wipes out his narcotic conviction which in turn removes a ground of inadmissibility under Section 212(a) of the Immigration and Nationality Act, thereby making him eligible for the creation of a record of lawful admission for permanent residence pursuant to Section 249 (supra).

The special inquiry officer denied the motion on the ground that the respondent is ineligible for relief under Section 249 (supra) because of the provisions of Section 241(b) and Section 212(a)(23) of the Act. The special inquiry officer reasons that notwithstanding the fact there is no expressed provision of the Immigration and Nationality Act rendering a pardon ineffective to prevent excludability, the respondent would immediately upon reentry be deportable under Section 241(a)(11) as Section 241(b) renders his pardon unavailable as a waiver of deportability.

Counsel urges error in the conclusion reached by the special inquiry officer. He argues that the respondent is not inadmissible under Section 212(a)(23) of the Act because the restriction found in Section 241(b) has no application to an exclusion proceeding. Counsel relies upon a case decided by the Supreme Court wherein it was stated that "A pardon reaches both the punishment prescribed for the offense, and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the

offender is as innocent as if he had never committed the offense." *Ex parte Garland,* 71 US 366, 377 (1867). Counsel urges that under the authority of the *Garland* case (supra) the respondent's pardon has the effect of waiving his excludability under Section 212(a)(23) of the Act.

Section 249 of the Immigration and Nationality Act provides, inter alia, "A record of lawful admission for permanent residence may . . . be made in the case of any alien . . . if . . . such alien shall satisfy the Attorney General that he is not inadmissible under Section 212(a) insofar as it relates to . . . violators of the narcotic laws . . ." Accordingly, a record of lawful admission cannot be created in behalf of the respondent unless the pardon granted him by the Governor of California removes the ground of inadmissability set forth in Section 212(a)(23) of the Act.

We believe that the respondent's ineligibility for relief under Section 249 is controlled by the last sentence of Section 241(b) which renders a pardon ineffective in the case of any alien who has been convicted of a narcotic violation. A grant of permanent residence under Section 249 would not make the respondent immune from deportation because his pardon does not waive a narcotic conviction. Since the respondent would be subject to immediate deportation under Section 241(a)(11) of the Act once he was admitted and since there is a provision of Section 241 (a) which renders an alien deportable if he was excludable by law at the time of entry, we find no logi-

cal reason to support a concusion that the pardoning provisions of Section 241(b) apply to a narcotic ground of excludability without the limitation which denies the waiver to an alien "who is charged with being deportable" as a narcotic violator. Under the circumstances, we find that the respondent is ineligible for the creation of a record of lawful admission under Section 249 of the Immigration and Nationality Act. Regardless of the pardon which sets aside the respondent's conviction, nevertheless he is a "violator" as that term is used in Section 249 (supra).

Counsel maintains that that portion of Section 241 (b) (supra) which limits the pardoning power of the executive branch of the Government is unconstitutional and not properly the subject of legislative control. This Board has consistently held that it is not within our province to pass upon the constitutionality of the statutes we administer. *Matter of L-*, 4 I&N Dec. 556 (BIA, November 21, 1951). We affirm the order entered by the special inquiry officer denying the respondent's motion to reopen the proceedings and will dismiss the appeal.

Order: It is ordered that the appeal be and the same is hereby dismissed.

Chairman

United States Department of Justice
Board of Immigration Appeals

May 3 - 1967

File: A-10845906—San Francisco

In re: Huey, Gim Woon aka Huey Poy aka Robert Huey aka Fook Yen Lock

In Deportation Proceedings

Motion

On Behalf of Respondent: Joseph P. Fallon, Jr., Esq.
Fallon, Hargreaves & Bixby
559 Washington Street
San Francisco, Calif.
94111

Charges:
Order: Section 241(a)(1), I&N Act (8 USC 1251 (a)(1))—
Excludable at time of entry—Immigrant, no visa

Lodged: None

Application: Reopen and remand to consider application for Section 249 adjustment of status

The case comes forward on motion to reopen and remand the proceedings to allow respondent to file an application for adjustment of status under Section 249, Immigration and Nationality Act (8 USC 1259). He is presently under an order of deportation.

The record relates to a 39-year-old married male alien, a native and citizen of China, who entered the United States on October 9, 1940 under a false claim to United States citizenship. He was not then in possession of an immigration visa. Deportability has been conceded and thus is not in issue.

On May 31, 1966 the special inquiry officer denied respondent's application for status as a permanent resident under Section 245 of the Immigration and Nationality Act and ordered respondent deported to the Republic of China on Taiwan on the charge in the Order to Show Cause. The basis for the denial of the Section 245 application was that respondent was ineligible to receive an immigrant visa for admission to the United States as a permanent resident because he was inadmissible under Section 212(a)(23), Immigration and Nationality Act (8 USC 1182(a)(23)) because of a narcotics conviction.

Respondent's narcotic conviction of January 6, 1949 making him excludable under Section 212(a)(23) of the Act makes him ineligible for relief under Section 249 as well as Section 245. Section 249 provides in part:

> "A record of lawful admission for permanent residence may, in the discretion of the Attorney General . . . . be made . . . if such alien shall satisfy the Attorney General that he is not inadmissible under Section 212(a) insofar as it relates to . . . . violators of the narcotics laws . . . (etc)"

Relative to the narcotics conviction, respondent was granted a full and unconditional pardon by the

Governor of California on June 28, 1963. At the previous hearing it was contended that this pardon had the effect of insulating respondent from excludability under Section 212(a)(23) of the Act. We adequately dealt with this contention in our opinion of September 26, 1966 and held that it was settled law that a conviction is not entirely obliterated by a pardon subsequently granted, and hence in respondent's case the pardon does not relieve him from excludability under said Section 212(a)(23). This point is of course also pertinent to the instant motion.

Since respondent cannot show that he not inadmissible under Section 212(a) he is statutorily ineligible for the discretionary relief of Section 249 and thus no useful purpose would be served by remanding the proceedings to allow him to file an application for such relief.

Order: It is ordered that the motion be and the same is hereby denied.

Acting Chairman

United States Department of Justice
Board of Immigration Appeals

Jul 31 1967

File: A-10773765—San Francisco

In re: Lee, Heung

In Deportation Proceedings

Appeal

On Behalf of Respondent: Joseph S. Hertogs, Esq.
Jackson & Hertogs
580 Washington Street
San Francisco, Calif.
94111
(Brief filed)

Charges:

Order: Section 241(a)(11), I&N Act (8 USC 1251 (a)(11))—Narcotics possession, conviction: possession of opium, violation of Section 11500, California Health and Safety Code

Lodged: None

Application: A reopening of the proceeding to afford the respondent an opportunity to apply for relief under Section 249 of the Immigration and Nationality Act

The respondent, a native of the mainland of China and a citizen of the Republic of China on Formosa, has been found deportable as one convicted of a narcotic violation pursuant to Section 241(a)(11) of the

Immigration and Nationality Act (8 USC 1251(a)(11)). An order providing for the respondent's deportation to the Republic of China on Formosa was issued by the special inquiry officer on January 9, 1963. There was no appeal from this decision.

The respondent now moves for a reopening of the proceedings to afford him an opportunity to apply for the creation of a record of lawful admission for permanent residence under Section 249 of the Immigration and Nationality Act (8 USC 1259). The special inquiry officer, in an order dated June 14, 1967, denied the motion. The respondent appeals from this order.

The respondent is a married male alien, 54 years of age, who last entered the United States through the port of San Francisco, California on July 21, 1939. He was admitted as a citizen on this occasion. He revealed his true identity and citizenship in 1960.

The respondent, on June 3, 1955, was convicted in the Superior Court of the State of California in and for the County of San Joaquin, of unlawful possession of opium in violation of Section 11500 of the California Health and Safety Code. He served 90 days in the county jail for the narcotics conviction.

The respondent, on December 23, 1962, was granted a full and unconditional pardon by the Governor of the State of California for the narcotics offense. The special inquiry officer denied the motion on the ground that the respondent is ineligible for relief under Section 249 of the Immigration and Nationality Act because of the provisions of Section 241(b) and Sec-

tion 212(a)(23) of the same Act. The special inquiry officer reasons that notwithstanding the fact that there is no expressed provision of the Immigration and Nationality Act rendering a pardon ineffective to prevent excludability, the respondent would immediately upon reentry be deportable under Section 241(a)(11) as Section 241(b) renders his pardon unavailable as a waiver of deportability.

Counsel urges error in the conclusion reached by the special inquiry officer. He argues that the respondent is not inadmissible under Section 212(a)(23) of the Act because the restriction found in Section 241(b) has no application in an exclusion proceeding. Counsel maintains that our decision in *Matter of R-G-*, 8 I&N Dec. 128 (BIA, September 2, 1958) is distinguishable from the respondent's case. We held in *Matter of R-G-* (supra) that notwithstanding the lack of a specific statutory ground of exclusion, an alien who upon entry would immediately become subject to deportation should be found excludable. Counsel refers to a statement in *Matter of R-G-* (supra) which said that our holding in *Matter of V-*, 7 I&N Dec. 565 was merely that the language of the exclusion provision governs in exclusion proceedings and not the language of some related deportation provision.

Counsel, on the basis of the foregoing, reasons that the inadmissibility required under Section 249 must be determined under Section 212 of the Act since Section 212(a)(23) contains a provision relating to a narcotic violation. Counsel argues that the special inquiry officer is in error when he relied on Section

241(b) of the Act as a sufficient basis to conclude that the respondent is excludable under Section 212 (a)(23) of the same Act and that this conclusion is contrary to the precedent decisions of this Board.

Section 249 provides, inter alia, "a record of lawful admission for permanent residence may . . . be made in the case of any alien . . . if . . . such alien shall satisfy the Attorney General that he is not inadmissible under Section 212(a) insofar as it relates to . . . violators of the narcotic laws . . ." Accordingly, a record of lawful admission cannot be created in behalf of the respondent unless the pardon granted him by the Governor of California removes the ground of inadmissibility set forth in Section 212(a)(23) of the Act.

We believe that the respondent's ineligibility for relief under Section 249 is controlled by the last sentence of Section 241(b) which renders a pardon ineffective in the case of any alien who has been convicted of a narcotic violation. A grant of permanent residence under Section 249 would not make the respondent immune from deportation because his pardon does not waive a narcotic conviction. Since the respondent would be subject to immediate deportation under Section 241(a)(11) of the Act once he was admitted and since there is a provision of Section 241(a) which renders an alien deportable if he was excludable by law at the time of entry, we find no logical reason to support a conclusion that the pardoning provisions of Section 241(b) apply to a narcotic ground of excludability without the limitation which denies the waiver to an alien "who is charged

with being deportable" as a narcotic violator. Under the circumstances, we find that the respondent is ineligible for the creation of a record of lawful admission under Section 249 of the Immigration and Nationality Act. Regardless of the pardon which sets aside the respondent's conviction, nevertheless he is a "violator" as that term is used in Section 249 (supra).

Counsel also urges that that portion of Section 241 (b) (supra) which limits the pardoning power of the executive branch of the Government is unconstitutional and not properly the subject of legislative control. Counsel relies upon a case decided by the Supreme Court wherein it was stated that "a pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eyes of the law the offender is as innocent as if he had never committed the offense." *Ex parte Garland,* 71 US 366, 377 (1867).

This Board has consistently held that it is not within our province to pass upon the constitutionality of the statutes we administer. *Matter of L-,* 4 I&N Dec. 556 (BIA, November 21, 1951). We affirm the order entered by the special inquiry officer denying the respondent's motion to reopen the proceedings and will dismiss the appeal.

Order: It is ordered that the appeal be and the same is hereby dismissed.

Chairman

Appendix D

STATUTES INVOLVED

Section 249 of the Immigration and Nationality Act, as amended, 8 USCA 1259:

"Record of admission for permanent residence in the case of certain aliens who entered the United States prior to June 30, 1948.

A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, as of the date of the approval of his application or, if entry occurred prior to July 1, 1924, as of the date of such entry, if no such record is otherwise available and such alien shall satisfy the Attorney General that he is not inadmissible under section 1182(a) of this title insofar as it relates to criminals, procurers, and other immoral persons, subversives, violators of the narcotic laws or smugglers of aliens, and he establishes that he—

(a) entered the United States prior to June 30, 1948;

(b) has had his residence in the United States continuously since such entry;

(c) is a person of good moral character; and

(d) is not ineligible to citizenship."

Section 212 of the Immigration and Nationality Act, 8 USCA 1182:

"Excludable classes of aliens; non-applicability to certain aliens; waiver of requirements; parole of aliens; report to Congress; suspension of entry by President.

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States

* * * * *

(23) Any alien who has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, or any salt derivative or preparation of opium or coca leaves, or isonipecaine or any addiction-forming or addiction-sustaining opiate; or any alien who the consular officer or immigration officers know or have reason to believe is or has been an illicit trafficker in any of the aforementioned drugs;"

* * * * *

Section 241 of the Immigration and Nationality Act, as amended, 8 USCA 1251:

"Deportable aliens—General classes

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * * * *

(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate;"

* * * * *

(b) The provisions of subsection (a)(4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply

(1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several states, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter. The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a) (11) of this section."